SUPREME COURT OF MICHIGAN.[1]

Mortgage of Indemnity —Power of Sale less extensive than the Condition.—A mortgage contained an ordinary condition of indemnity against the payment of certain notes. It then provided, that if the mortgagee "shall promptly pay and discharge all notes or other papers of his, upon which said parties of the first part shall or may become indorsers or acceptors, together with all interest, costs and charges accruing thereon, so as to save said parties of the second part harmless by reason of their connection with such papers," &c. The power of sale was limited to the case of the mortgagees being damnified by paying the debts which the mortgagee failed to pay. It was held, that this was not a mortgage of indemnity merely, and might be foreclosed in equity on failure of the mortgagor to pay the debts when due, notwithstanding the mortgagees had not paid them: that the power of sale was not necessary to the mortgage, and if less extensive than the conditions, it could not do away with any condition actually expressed: *Butler* vs. *La Due.*

Replevin of Property of which Defendant is not in actual Possession.—Defendant made a levy upon property in plaintiff's possession, and indorsed the levy upon his execution, but went away without removing the property. Plaintiff brought replevin therefor. It was held that plaintiff, being himself in the actual possession of the property at the time of bringing the suit, could not maintain the action: *Hickey* vs. *Hinsdale.*

Assignment for the benefit of Creditors—Reservation of exempt Property—Acts of Assignor after assignment as showing fraud, &c.—An assignment for the benefit of creditors is not void because it reserves property exempt from execution without specifying it: *Smith* vs. *Mitchell.*

Evidence that goods were at the railroad depot at the time of the assignment, directed to the assignor, and which he took and disposed of afterwards, is proper, as bearing upon the question of good faith in making the assignment: *Id.*

Evidence of the assignee's knowledge of such subsequent disposal, is admissible on the same ground: *Id.*

The assignment is void if it does not fairly, and in good faith, assign all the assignor's property liable for the payment of his debts: *Id.*

Where an officer had levied upon the property assigned by virtue of an execution, and caused it to be sold at public auction, and was sued for its

[1] From Hon. T. M. Cooley, Reporter, to appear in Vol. XII., Michigan Reports.

value, it was held, that evidence of the price obtained at the sale was admissible as having some tendency to prove its value: *Id.*

Common Law Certiorari where another Remedy exists.—Where a statute gives a party a remedy by appeal, on which the question of jurisdiction may be raised and passed upon, and the party suffers the time for appeal to elapse and then sues out a common law certiorari, the writ will be quashed on motion: *Farrell* vs. *Taylor.*

The allowance of the writ in such case by an officer authorized to make it, is not binding upon the court, so as to make it compulsory to pass upon the questions raised by it: *Id.*

Bounty to Soldiers.—Where the state offered a bounty to three years' volunteers, and a draft for nine months being then made, the drafted men were allowed to volunteer, and were mustered in for three years, it was held, they were entitled to the bounty: *People* vs. *Hammond.*

SUPREME COURT OF MASSACHUSETTS.[1]

Bank—Implied Contract for payment of its President.—There is no implied contract on the part of a banking corporation, whose objects are partly charitable, to pay for official services rendered to it by its president; nor is such contract established by proof that the president informally mentioned to some of its directors that he should expect compensation, and that they made no reply: *Sawyer* vs. *Pawners' Bank.*

Contract—Wages to continue after death of Employer—Performance of Services for his Executors.—Under a contract "to devote my time and best energies from daylight in the morning until nine o'clock in the evening to A. for the term of one year," for a stipulated sum by the day, with a provision that the wages shall continue the same until the expiration of the term, in case of the previous death of A., the performance of reasonable services, after the death of A. within the term, upon the request of his executors, is a condition precedent to the right to recover wages after such request: *Burdett* vs. *Yale et al.*

Sale.—Return and reacceptance of Goods—Continuance of terms of Original Sale—Guarantor.—If goods have been sold and delivered upon a guaranty of the payment of the purchase-money, the guarantor is not discharged by the return of a portion of them by the vendee, with complaint of dissatisfaction, and a subsequent acceptance thereof by him under

[1] From Charles Allen, Esq., to appear in Vol. VI. of his Reports.

a new agreement by which his objections were waived, and a discount from the original price for all the goods was made; and in such case the vendee is entitled only to the time of credit fixed by the original contract, if no extension thereof has been granted, and the vendor, in an action against the guarantor, may properly declare upon the original sale: *Rice* vs. *Filene.*

Sale of Goods for Cash—Interest.—A purchaser of goods for cash payable on delivery is chargeable, in case of non-payment, with interest from the date of the delivery of the goods: *Foote* vs. *Blanchard.*

Common Carrier—Liability as Forwarding Agent only beyond termination of his Route.—A carrier who acts as the forwarding agent of the owner of goods in giving directions by way-bills or otherwise to the successive lines of transportation over which they are to be carried, beyond the termination of his own route, is responsible as such forwarding agent only for the want of reasonable diligence and care: *Northern R. R. Co.* vs. *Fitchburg R. R. Co.*

A way-bill of iron rails, to be transported over several successive lines of transportation by railroad, made out by the agents of the first line in this form: "Way-bill of merchandise transported by the F. R. R. from C. to B. Nov. 27, 1852. (Consignees) Ogdensburg R. R. (Description of articles) Rails, part lot," is sufficient to show to the intermediate carriers that the rails are to be carried and delivered to the Ogdensburg Railroad at B., and to exonerate the first carrier from liability, although the rails are detained and used by one of the intermediate railroad companies, which at the same time is receiving other similar rails over the same route for its own use: *Id.*

Carrier—Forwarding Agent beyond his Route—Lien for Freight—Damages for sale of Goods to pay Freight.—A carrier who receives goods to be carried not only over his own line, but over successive lines of transportation connected with it, and to be delivered at some distant point, acts, in the absence of special instructions from the owner to the succeeding carriers, as his forwarding agent, in giving directions to them as to the transportation of the goods; and in case of a mistake made by the first carrier in directing the goods, or in the bills, by reason of which they are sent to the wrong place, the last carrier has a lien upon them for the freight earned by him, and also for the sums paid by him for the freight from the commencement of the transportation: *Briggs* vs. *Boston and Lowell R. R. Co.*

A carrier who has a lien on goods for the freight earned by him in

transporting them, and also for sums paid for freight earned by preceding carriers thereof, has no right to sell the goods to enforce the lien: *Id.*

If a carrier who has a lien on goods for freight wrongfully sells them, he is liable to an action for the conversion: and the measure of damages is the market value of the goods, deducting the amount of the lien: *Id.*

Negligence—Duty of party passing dangerous place with which he is familiar.—In an action to recover damages for a personal injury sustained by reason of a defective way, it is no error to refuse to instruct the jury that if the plaintiff was familiar with the place where the accident occurred, it was his duty to use more care in passing there than if he was wholly ignorant of its condition, or to avoid the place altogether, if instructions were given that the burden of proof was on him to show that he used reasonable care, adapted to the circumstances of the case, and that if he was familiar with the place they should take this fact into consideration, and determine whether on account of it he ought to have used increased care in passing over it, or to have avoided it altogether: *Smith* vs. *City of Lowell.*

Railroad Company—Injury to Property by Sparks from Locomotive.—The St. of 1840, c. 85, § 1, providing that when any injury is done to a building or other property of any person or corporation, by fire communicated by a locomotive engine of any railroad corporation, the said railroad corporation shall be held responsible in damages to the person or corpoporation so injured, and that any railroad corporation shall have an insurable interest in the property for which it may be so held responsible, along its route, and may procure insurance thereon in its own behalf, extends to personal property, although such corporation had no knowledge or reasonable cause to believe that such property was situated where it might be so injured: *Ross* vs. *Boston and Worcester R. R. Co.*

Evidence—Parol to show a paper not to be genuine.—Parol evidence is competent to show that a paper produced upon notice in the trial, as and for the paper called for, is not such in reality; and also, if there is no better evidence, to prove the contents of the genuine paper: *Gilmore* vs. *Whitcher.*

Gas-light company—Action for injury to Health by Escape of Gas—Evidence of Experts—Plaintiff's Declarations.—In an action against a gas-light company to recover damages for an injury to the plaintiff's health

caused by an accidental escape of gas from a main pipe in a public street, from which it passed through various sewers and drains into the plaintiff's cellar and house, no exception lies to the refusal of the judge to allow evidence of the escape of gas into other houses at the time alleged, and that the defendants were negligent in relation thereto, before it has been shown that gas came into the plaintiff's house. Nor can a physician, who has been in practice for several years, but who has had no experience as to the effects upon the health of breathing illuminating gas, be allowed to testify in relation thereto as an expert. And experience in attending upon other persons who, it is alleged, were made sick by breathing gas from the same leak, is insufficient for this purpose: *Emerson* vs. *Lowell Gas-light Co.*

A plaintiff's narrative declarations of past events, though made to his attending physician, are incompetent evidence in his favor: *Id.*

An expert may not only testify to opinions, but may state general facts which are the result of scientific knowledge or general skill: *Id.*

SUPREME COURT OF NEW YORK.[1]

Gift—Husband and Wife.—The defendant, being indebted to H., gave her his promissory note for the amount, payable to the plaintiff, and the same was, by the direction of H., given to the plaintiff, as a gift to her, and as her separate property; she being a married woman: *Held*, that the plaintiff could maintain an action upon the note, in her own name, alone; and that in such action counter-claims against her husband could not be allowed: *Paine* vs. *Hunt.*

Will—Construction of Devise.—A testator devised as follows: "I give and devise to J. M., the house and lot I now occupy, to be used and enjoyed by him during the term of his natural life, and from and immediately after his decease, I give and devise the same to S., the daughter of said J. M., her heirs and assigns for ever. It is my wish, however, that so long as the house shall remain in the actual occupation of J. M., and his sister E. H. shall remain a widow, &c., the said E. H. shall have the free and full use of the east chamber thereof: but nothing herein contained shall be construed to prevent J. M. from selling the said house and lot and giving full possession thereof, whenever his and his daughter's interest may be promoted thereby." *Held*, that the testator did not intend to give J. M. the power to sell in fee, but only to limit E. H.'s right to the possession of the east chamber, in the event of J. M. selling or leasing his life estate: *Carter* vs. *Hunt.*

[1] From Hon. O. L. Barbour, to appear in Vol. XL. of his Reports.

And that S. took a vested remainder in fee, which, upon her dying intestate, descended to her only child and heir at law, and upon the death of J. M., the tenant for life, such remainder became a fee simple absolute: *Id.*

Lease—Construction of.—A lease of a saw-mill contained a stipulation that the lessor, in case of a sale of the property, might at any time terminate the lease by notice; and that the lessee should have two months' notice to "saw out," and then, if any logs remained over, he should either have the privilege to continue in possession (at the lessor's option), at the same rate of rent, till the logs "on hand" were sawed, or should be allowed the extra cost of teaming the logs to another mill, and of getting them sawed there: *Held*, that the lessor having subsequently sold the mill, and demanded possession thereof, he thereby determined his election, under the agreement, to pay for removing the logs left over, and getting them sawed at another mill: *Crouch* vs. *Parker*.

Held, also, that the stipulation must be held to include all logs which the lessee had procured for the purpose of manufacturing at that mill, whether they were lying in the mill-yard, or in the basin where logs for that purpose were usually kept, or were on their way to the yard or basin; provided they had been procured before the giving of the notice, in the usual course of business of the lessee, and belonged to him, and were in the mill-yard or in the basin at the expiration of the two months: *Id.*

And that the lessee was entitled to recover of the lessor the expense of removing the logs so left over, and of sawing them elsewhere, without waiting until such expense had been actually incurred by him: *Id.*

Agreement within Statute of Frauds—Payment of a part of the Price—Delivery of the Goods.—A contract for the sale of goods for the price of $50 or more, is not taken out of the Statute of Frauds by the payment of a part of the purchase-money by the buyer, unless the payment is made at the time of making the contract. A payment afterwards will not avoid the statute: *Bissell* vs. *Balcom*.

The plaintiff and defendant, in August 1861, made a parol agreement for the sale by the former to the latter of fifteen head of cattle then on the plaintiff's farm, but not present, or in sight; the parties agreeing upon the price, which was over $50, and was to be paid on the 1st of December thereafter, unless the defendant should sooner take the cattle away. The plaintiff agreed to keep the cattle until that time, unless the defendant should choose to take them away before. The defendant never took any

of the cattle away: *Held*, in an action to recover the price, that there was no delivery and acceptance of the cattle, within the meaning of the Statute of Frauds; and that the sale was therefore void: *Id.*

Promissory Note; when Action on, may be commenced.—The maker of a promissory note has the whole of the last day of grace, in which to pay it. And if it be payable at a bank, an action commenced against the maker on the last day of grace, though it be after banking hours at such bank, will be prematurely brought, and the plaintiff will be nonsuited: *Smith* vs. *Aylesworth.*

Deed—Recording Acts—Cloud upon the Title.—Where a grantee takes his deed in good faith, and without notice of a prior unrecorded deed of the same premises, and is in possession under a clear record title, he will be protected against the prior deed by the recording acts: *Johnson* vs. *Crane and Wife.*

In such a case the prior unrecorded deed is void as to the subsequent grantee, and does not operate as even a color or shadow of title in any one as against him, or afford any ground for the interference of a court of equity: *Id.*

Vendor and Purchaser—Purchase of Goods by an Agent.—The defendants sent their agent, B., to the plaintiff, with a written order for a load of rye, nothing being said, in the order, as to the price, and B. having no authority to make a contract. The plaintiff informed B. that his price for the rye, was seventy-five cents per bushel, and that he would let the defendants have it at that price; and he directed B. to inform the defendants what the price was. This B. omitted to do, but took away a load of rye, and on returning for another load falsely stated to the plaintiff that he had told the defendants the price, and that they did not object to it; whereupon he obtained another load. The market price for rye, at that time, was only fifty cents per bushel: *Held*, that the plaintiff was entitled to recover the sum named by him to B. as his price for the grain: *Booth* vs. *Bierce.*

Held also, that there being an apparent bargain and sale at the vendor's price, which was entered into, on his part, in good faith, and which he had a right to rely upon as a valid agreement on the part of the purchasers, if either party must suffer from the misunderstanding, it should be the one who employed the agent by whom the fraud, which occasioned the injury, was practised: *Id.*

Agreement—Parol Evidence to explain.—An agreement by one person to "cancel" the indebtedness of another, to a third person, is an agree-

ment to pay it. The agreement to cancel must be held to include a promise to do whatever shall be necessary to effect the cancellation: *The Auburn City Bank* vs. *Leonard.*

There is a class of cases in which it has been held that an instrument which is apparently the personal obligation of the one by whom it is signed, may by parol be shown to be the obligation of another, for whom the person signing was acting as agent. But the rule applies, it seems, exclusively to cases in which it appears in the body of the instrument, or from the signature of the person by whom it is executed, that he was acting for another, and intended to bind such other, and not himself, personally: *Id.*

In such cases, where the party to whom the obligation is given, understands the character in which the party giving it is acting, parol evidence may, it seems, be given to show that the maker, or obligor, was acting in the matter as agent, merely: *Id.*

But where there is nothing of that kind either in the body of the instrument, or attached to the signature, to indicate that it was intended to be anything other than a personal obligation, such evidence is inadmissible: *Id.*

Where a promise made to A. to pay to B. a debt due the latter, has been adopted by B., it is regarded in law as a promise made to him: *Id.*

The proper office of construction is to ascertain and determine the intention of the parties. And, this is arrived at by considering the character in which the party undertakes; the nature and subject of the undertaking; and the terms employed in the instrument: *Id.*

NOTICES OF NEW BOOKS.

REPORTS OF CASES HEARD AND DECIDED IN THE SUPREME COURT OF MICHIGAN. By THOMAS M. COOLEY. Vol. VII., being Volume 11. of the series. Ann Arbor: published by the Reporter.

We notice with great pleasure the very handsome appearance of the Michigan Reports. The present volume will add to Mr. Cooley's already well-earned reputation as a good reporter. The syllabus to each case is full and clear, the statement of facts ample, but not prolix, and the arguments of counsel receive a measure of justice as unusual as it is commendable. The latter fact especially, in addition to the publication of dissenting and even of concurring opinions, when the court was not unanimous, renders the complete understanding of each case attainable, and adds very greatly to the value of the reports in other states. J. T. M.